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CURRENT TOPICS.

Our comments upon the West Virginia contempt case were not intended to show any bias. We merely expressed our unbiassed opinion upon the status which judges occupy before the people. We desire to be fair, and the publication by us of the judges' vindication of their course sufficiently evidenced such desire. It must be admitted that the item which caused the trouble, was a serious one, but there was no evidence that it was "born of malice" and we still believe that such judicial interference will result in the dereliction of the duty which the press owes to the public which supports it. Judge Snyder has filed a concurring opinion from which we quote the following pertinent paragraphs.

"It must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never except when the necessity is plain and unmistakable. It is not given for the private advantage of the judges who sit in the court but to preserve to them that respect and regard of which courts cannot be deprived, and maintain their usefulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges—that the court may command that respect and sanctity so essential to make the law itself respected—and that the streams of justice may be kept pure and uncorrupted. If the court is scandalized and its motives or integrity impeached, in regard to official acts or conduct, the consequences cannot be otherwise than baneful. The administration of the law is embarrassed and impeded, the passions often unconsciously roused, the rights of the parties endangered, and a calm and dispassionate discussion and investigation of causes prevented.

The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well-being of organized society, the rights of property and the life and liberty of the citizen is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired. It is all important to the due and efficient administration of justice that the courts of last resort should possess in a full measure the entire confidence of the people whose laws they administer. All good citizens will admit that he who wilfully and wantonly assails the courts by groundless accusations and thereby weakens the public confidence in them, commits a great wrong not done against the courts, but against the people of the State.

It must be and is cheerfully conceded that public journals have the right to criticise freely the acts of all public officers, executive, legislative and judicial. It is a constitutional privilege that even the Legislature cannot abridge. But such criticism should always be just and with a view to promote the public good. Where the conduct of a public officer is wilfully corrupt, no measure of condemnation can be too severe, but when the misconduct, apparent or real, may be simply an honest error of judgment, the condemnation ought to be withheld or mingled with charity. As is said by Holt in his work on Libel, chapter 9: "It is undoubtedly within the natural compass of the liberty of the press to discuss, in a decent and temperate manner, the decisions and judgments of a court of justice; to suggest even error; and, provided it be done in the language and with the view of fair criticism, to censure what is apparently wrong; but with this limitation, that no false or dishonest motives be assigned to any party." These views are in my judgment sound, and these rights should be cheerfully accorded so the press in this free and enlightened country.

I know full well that respect to courts or judges cannot be compelled. 'Respect is the voluntary tribute of the public to worth, virtue and intelligence and while these are found on the judgment seat, so long, and no longer, will courts retain the public confidence. But the people have placed the judge in a position in which he unavoidably comes in contact with the jealousies and resentments of those upon whose interest he has to act. His character, virtue and intelligence, however pure and unselfish, is not always a protection against the prejudices and passions of such as conceive themselves injured by his legitimate and proper official acts; and when assailed by such, if he may not punish them as a court, "he will be reduced to the alternative of either submitting tamely to contumely and insult, or to resenting it by force, or resorting to the doubtful remedy of an action at law.' 'In such a state of things,' as said by Judge Dade in *Dandridge's Case*, 'it would rest in the discretion of every party in court, to force the judge, either to shrink from his duty, or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To suppose that the personal character of the judge would be a sufficient guarantee against this is to imagine a state of society which would render the office of the judge wholly unnecessary.'

The people, for the benefit of society in the promotion of law, order and justice, have placed the judge in a situation in which by reason of his office and duties as such, he is exposed to assaults and unjust suspicions which he would not have to incur as a private citizen. These assaults and suspicions do not attach to him as a citizen. It is these that the power of the court should defend him against, and not those which attach to him as a private person merely. In this country there are and ought to be no privileges but such as exist for the public good. No privilege can be claimed or admitted for a judge, except such as pertain to his official acts. Attacks upon these it is neither his duty nor his right as a private citizen to defend himself against. These are the acts of the people which they have imposed upon him, and it is their duty alone to defend, or to give the judge the power as an officer to do so for them. Experience has shown that this is absolutely necessary and that its exercise cannot be withheld without destroying the efficiency and usefulness of courts. The judge as a private citizen, is not entitled to redress his grievances except as other citizens; but his public acts are not of that character and cannot and ought not to be so defended.

While it cannot be successfully, as I think, denied that this protective power, this right of self-defence, exists as a necessity and must be exercised by some

officer, it must be conceded that it is undefined and to a large extent arbitrary, and would therefore seem to be, abstractly considered, liable to abuse, if not dangerous, in the hands of the court which is itself the subject of the offence. But in reply we may, with just pride, refer to the history of the jurisprudence of Virginia and this State to prove that this power is not likely to be abused and that it could not be entrusted to safer hands than the Supreme Courts of these States. The reports of Virginia, covering more than a century, show but one case of this character, and this is the first case that has occurred in this court or any circuit court of this State, so far as I know. This creditable fact in our history does honor not only to the courts but to the press and people of these States."

THE MODERN IDEA OF JURISDICTION.

The idea of jurisdiction entertained by the old jurists appears to have been that jurisdiction is simply the power to decide something in a given controversy—to proceed to judgment, to render some kind of a judgment,—and that beyond this everything else related to the propriety of the judgment rendered. "Jurisdiction," said Mr. Justice Baldwin, "is power to hear and determine the subject matter in controversy between the parties to the suit; to adjudicate or exercise any judicial power over them. The question is, whether in the case before the court, their action is judicial or extra-judicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it."[1] In like manner, it was said in Court of Appeals of New York by Johnson, J., in a case relating to the power of a court to grant an injunction: "We are not called upon to say whether the court decided right or not in granting the injunction, but whether it became their duty to decide either that it should be granted or denied. If such was their duty, then they had jurisdiction; and their decision, be it correct or erroneous, is the law of the case until it shall be reversed on appeal, and can only be questioned on a direct proceeding to review it, and not collaterally."[2] In like manner, Chief Justice Marshall, in speaking of the obligation of a judgment of a court of general jurisdiction, used the following language: "The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case as in the other, and must remain in full force, unless reversed regularly by a superior court capable of reversing it."[3]

The modern idea, as distinguished from this, is that jurisdiction is not merely the power to proceed in a cause and to render some judgment therein, but that it is the power to render the particular judgment which was rendered. This modern idea has been taken up by several respectable courts, including the Supreme Court of the United States. That court acted upon this idea in *Ex parte* Lange,[4] where it discharged by *habeas corpus* from imprisonment, a defendant who had been erroneously sentenced, and whose sentence was amended by the court after it had been in part executed. The doctrine having gotten a foot-hold there, it was reiterated in subsequent decisions. In one of these it was said by Mr. Justice Bradley: "When a person is convicted or in execution by a legal process issued by a court of competent jurisdiction, no relief (by *habeas corpus*) can be had. Of course, a superior court will interfere, if the inferior court had exceeded its jurisdiction, or was not competent to act."[5] In a later case in the same court it was said by Mr. Justice Swayne: "We do not overlook the point that there must be jurisdiction to give the judgment rendered as well as to hear and determine the case. If a magistrate having authority to fine for assault and battery should sentence the offender to be im-

[1] State of Rhode Island v. State of Massachusetts, 12 Pet. 718. See also Grignon's Lessee v. Astor, 2 How. U. S. 338.

[2] People v. Sturtevant, 9 N. Y. 263, 267.

[3] *Ex parte* Watkins, 3 Pet. U. S. 193, 203. To the same general effect see *ex parte* Parks, 93 U. S. 18; *ex parte* Winston; 9 Nev. 71; *re* Callicot, 8 Blatchf. 89; People v. Shea, 3 Park. Cr. R. 562.

[4] 18 Wall. 163.

[5] *Ex parte* Park, 93 U. S. 18.

prisoned in the penitentiary, or suffer the punishmeht prescribed for homicide, the judgment would be as much a nullity as if the proper jurisdiction to hear and determine did not exist. Every act by a court beyond its jurisdiction is void."[6] In a recent decision known as the Kuklux Case,[7] this doctrine is more fully announced by Mr. Justice Miller in the following carefully chosen language:

"That this court has no general authority to review, on error or appeal, the judgments of the circuit courts of the United States in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be, as charged, a matter of which such a court had no jurisdiction, to discharge a prisoner from confinement. It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of *habeas corpus* into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further."

A passage is found in Bacon's Abridgement, tit. *Habeas corpus* probably in the language of Chief Baron Gilbert, to the same effect. "If the commitment be against law, as being made * * * * for a matter for which by law no man ought to be punished, the court are to discharge."[8] That is a very general expression, and does not answer the inquiry who is to decide conclusively whether the commitment be against law; whether the court making the commitment is so to decide, or the court hearing the *habeas corpus*. In the New York Court of Appeals the idea has taken root that the court hearing the *habeas corpus* is to decide. Thus, in a much quoted ease Denio, J., said: "Where the act is necessarily justifiable, it would be preposterous to hold it a cause of imprisonment."[9] The courts which have quoted this language have generally overlooked the fact that the case in which it was used was a case where the court of appeals had possession of the subject-matter in a direct proceeding, and not where it was proceeding in the exercise of an original jurisdiction by *habeas corpus*. In the Supreme Court of the United States the same principle has been admitted when applied to imprisonment under conviction and sentence "in cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void."[10] The same idea was applied by the Court of Appeals of New York in the celebrated case of Tweed,[11] and followed by the Supreme Court of Missouri in a case where the application of the rule was clearly not appropriate because in that State, every case is removable to the Supreme Court by appeal or writ of error.[12] Other courts have held in proceedings by *habeas corpus* that it is competent to decide whether the statute creating the crime for which the sentence was imposed was constitutional, and hence valid.[13]

It can not escape attention that this modern doctrine is irreconcilable with the early doctrine declared by Chief Justice Marshall. If the judgment of a court having jurisdiction to render some judgment in the case is, as Marshall said it was, conclusive, and pronounced the law of the case,[14] upon what principle can another tribunal, proceeding by the writ of *habeas corpus*, hold that the judgment was such a judgment as the court had no power to render; that is to say, hold that it is not conclusive and does not pronounce the law of the case? The English Court of Queen's Bench, in a modern case, denied that it had such power. "No objection," said Lord Denman, C. J., "was made to the re-

6 *Ex parte* Reed, 100 U. S. 13, 23.

7 *Ex parte* Yarbrough, 110 U. S. 651; s. c. 12 Wash. L. Rep. 149.

8 Bac. Abr. *habeas corpus* B. 10.

9 People v. Kelly, 24 N. Y. 74, 77; s. c. in court below, 21 How. Pr. 54, 103.

10 *Ex parte* Siebold, 100 U. S. 371, 376.

11 People *ex rel* Tweed v. Liscomb, 60 N. Y. 559.

12 *Ex parte* Page, 49 Mo. 291.

13 *Ex parte* Siebold, 100 U. S. 371, 376; s. c. 26 Alb. L. J. 247; *ex parte* Clark, 100 U. S. 399; *ex parte* Hardy, 13 Cent. L. J. 50; McCarthy v. Hinman, 35 Conn. 538; *ex parte* Nitingale, 12 Fla. 272; *ex parte* Slaven, 3 Tex. App. 662; *ex parte* Mabry, 5 Tex. App. 93; Caesar Griffin's case, Chase's Dec. 364; s. c. 25 Tex. Supp. 623. See, also, *ex parte* Gregory, 1 Tex. App. 753; *ex parte* Schwartz, 9 Tex. App. 381, 387; Perry v. State, 41 Tex. 490; *ex parte* Coupland, 26 Tex. 386; *ex parte* Blumer, 27 Tex. 734.

14 *Ex parte* Watkins, 3 Pet. 193, 203.

turn on the grounds that it did not show jurisdiction in the court to try and punish for the crime of burglary; but it was said to be bad for not showing that the court had power to punish it by transportation. We think, however, that the court having competent jurisdiction to try and punish the offence, and sentence being unreversed, we can not assume that it is invalid or not warranted by law, or require the authority of the court to pass sentence to be set out by the jailor upon the return. We are bound to assume, *prima facie*, that the unreversed sentence of a court of competent jurisdiction is correct; otherwise we should be in effect constituting ourselves a court of appeal without power to reverse the judgment. * * * * Even if the sentence is erroneous, this court can not set it aside, or inquire into its propriety, or deny it the effect which the law assigns to any sentence."[15] This was a case where one court was asked to discharge by *habeas corpus* a prisoner held under sentence of another court over which the court issuing the writ of *habeas corpus* had no appellate or superintending jurisdiction, on the ground that the former court had exceeded its powers in imposing the sentence; that is, on the ground that it had imposed a sentence of transportation, which it had no power to do; and the court of Queen's Bench refused to discharge the prisoner on this ground. It is believed that this decision embodies the unquestioned rule which is to be applied as between courts of co-ordinate jurisdiction, or by one court toward another court over which it has no appellate or superintending jurisdiction, irrespective of the respective rank or dignity of the two courts. It embodies the doctrine which the courts of Westminster Hall have always applied with reference to the sentences of courts of the British dominions such as those of the Isles of Man, Jersey and St. Helena, military courts at Gibraltar and the like. It unquestionably embodies the rule which ought to be applied as between the State and the Federal courts in dealing with each other's judgments, respectively; but we are sorry to see that it does not embody the rule which is applied in the Federal courts in dealing with the judgments of the State courts.

[15] *Re* Brenan, 10 Q. B. 492; s. c. 11 Jur. 775; 16 L. J. (Q B.) 289.

The Circuit Courts of the United States and even the circuit and district judges at chambers, issuing the writ of *habeas corpus ex officio*, seem to have taken up the idea that they possess, by means of this writ, an appellate or superintending jurisdiction over the State courts, without reference to the rank or dignity of the latter. It would expand these criticisms to too much length to cite authorities showing this. The doctrine of the Supreme Court of the United States that it is the office of that court, under the writ of *habeas corpus*, to inquire, not only whether the court whose judgment is called in question had power to render some judgment in the case, but whether it would be better to render the particular judgment which was rendered, can be vindicated upon one ground only, and that is, that the Supreme Court of the United States in using the writ of *habeas corpus*, in cases of imprisonment under sentences of the circuit and district courts of the United States, uses it as an incident of its appellate jurisdiction and by analogy to the writ of error, which does not lie from the judgment of the inferior Federal courts to the Supreme Court in criminal cases. Indeed, in the case where the power of the Supreme Court of the United States was to use the writ of *habeas corpus*, was first asserted, the writ was likened by Chief Justice Marshall to a writ of error. It will also be perceived that nearly every reported case in which the courts have asserted the power to inquire by *habeas corpus* whether other courts in rendering a particular judgment, or in passing a particular sentence, exceeded their powers in the premises, they having had power to render some judgment, were cases where the courts so issuing the writs of *habeas corpus* were courts possessing appellate or superintending jurisdiction over the courts whose judgments were thus inquired into. To this extent then, the writ of *habeas corpus* is used as a writ of error. The judgment of the courts which are thus questioned are not collaterally assailed; and it is therefore not a correct principle to say, with reference to a judgment when collaterally assailed, that its validity depends upon the power of the court to render that particular judgment.

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LIABILITY OF EMPLOYER FOR NEGLIGENCE OF INDEPENDENT CONTRACTORS AND THEIR SERVANTS.

The general rule concerning the liability of a first employer for the negligent acts of an independent contractor or his servants is familiar. There are some exceptions, however, which limit its application. Until we reach these exceptions, the law of master and servant as principal and agent prevails. Beyond this, questions of public policy and interest arise. The general rule is also modified by statute in many States. These statutes for the most part relate to corporations. It is here the general rule is most widely departed from. Where the contract is for something lawful, and is proper in its terms, and the contractor is competent, and the employer owes no duty to others in respect to the work, and has no control over the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master;[1] nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence.[2] The rule relieves a contractor who has given the work exclusively to a sub-contractor.[3] Under such agreements the principal has no responsibility for the manner or mode of performing the work, and if there are no public interests to consider, he has exhausted the requirements of a prudent man by relinquishing entire control of the matter to a competent person. In the absence of evidence to the contrary, he is presumed to have employed the latter to do the work in a lawful and reasonable manner.[4] He is not responsible for acts not in reason to be anticipated from the fulfillment of the agreement. If he has provided in his contract against possible contingencies, he should not be held to account for those contingencies, unless public policy overrides such provisions. For matters occurring outside the contract he is responsible in any event. "When the obstruction or defect" (or the act complained of), says the court in Robbins v. Chicago, "is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his work-

[1] Milligan v. Wedge, 9 Exch. 702; Martin v. Temperley, 4 Q. B. 298; De Forrest v. Wright, 2 Mich. 368; Pierce v. O'Keefe, 11 Wis. 180; Butler v. Hunter, 7 Hurl & Nor. 826; Overton v. Freeman, 3 Car. & K. 49; s. c. 8 Eng. L. & E. 479; Cincinnati v. Stone, 5 Ohio (N. S.) 38, 41; McGuire v. Grant, 25 N. J. 356; Hall v. Johnson, 80 Ill. 185; McCafferty v. Spuyten Duyvil, etc., R. Co. 61 N. Y. 178; s. c. 19 Am. Rep. 267; King v. New York etc. R. C. 66 N. Y. 181; s. c. 23 Am. Rep. 37; Scammon v. Chicago, 25 Ill. 424; Cuthbertson v. Parsons, 12 C. B. 304; Rapson v. Cubbitt, 9 M. & W. 710; Welfare v. R. R. 4 Q. B. 693; Reedie v. R Co., 4 Exch. 243; Allen v. Hayward, 7 Q. B. 960; Burke v. R. R. L. R., 1 C. P. D. 205; Chicago v. Robbins, 2 Black (U. S.) 417; Tibbetts v. R. Co. 62 Mo. 437; Clark v. R. Co., 28 Vt. 103; Hilliard v. v. Richardson, 3 Gray, 349; Linton v. Smith, 8 Gray, 147; Forsyth v. Hooper, 11 Allen, 419; Lawrence v. Shipman, 39 Conn. 586; Kelly v. Mayor, 11 N. Y. 432; Cuff v. R. Co., 35 N. J. L. (6 Vroom.) 17; Painter v. Pittsburg, 46 Penn St. 213; Wray v. Evans, 80 Penn. St. 102; West v. R. Co. 63 Ill. 545; Pfarr v. Williamson, 63 Ill. 16; Hale v. Johnson, 80 Ill. 185; Robbinson v. Webb, 11 Barb. 464; Barry v. St. Louis, 17 Mo. 121; Palmer v. Lincoln, 4 Neb. 136; Steele v. L. E. R. R. 16 C. B. 556; Felton v. Deall, 22 Vt. 171; Wilson v. Allegheny City, 79 Penn. St. 272; Yates v. Squires, 19 Iowa, 26; Norton v. Wiswall, 26 Barb. 618; Sweeney v. Murphy, 32 La. An. 628; Prairie State etc. Co. v. Darcy 70 Ill. 52; States v. Mersereau, 64 N. Y. 138; King v N. Y. etc. R. Co. 66 N. Y. 181; King v. Livermore, 16 N. Y. S. C. 298; Eaton v. European etc. R. Co. 59 Me. 520; Allen v. Willard, 57 Penn. St. 374; Maxmillian v. Mayor, 62 N. Y. 162; Ham v. Mayor, N. Y. Ct. App. 1877; Alb. L. J. Sept. 29, 1877; Merrie v. Currie, L. R. 6 C. P. 24; Burgess v. Gray, 1 C. B. 578; Elder v. Beemis, 2 Mete. 599; Ballou v. Farnum, 9 Allen 47; Carbin v. Mills, 27 Conn. 274; Stevens v. Armstrong. 6 N. Y. 435; Williamson v. Wadsworth, 49 Barb. 294; Mertick v. Brainard, 38 Barb. 571; Holt v. Whately, 51 Ala. 569; Barry v. St. Louis, 11 Allen 419; Clark v. Vt. & Conn. R. Co., 28 Vt. 103; Ardesco Oil Co. v. Gibson, 63 Penn. St. 146; Peachy v. Pawland, 13 C. B. 182; Brackett v. Lubke. 4 Allen 138; Blake v. Hurst, 2 H. & C. 20; Sadler v. Henlack, 4 El. & Bl. 570; Harper v. Milwaukee, 30 Wis. 365.

[2] Knight v. Fox, 5 Exch. 721; Overton v. Freeman, 11 C. B. 867; Rapson v. Cubbitt, 9 M. & W. 710; Slater v. Mersereau, 64 N. Y. 139; Cuff v. R. Co. 35 N. J. L. (6 Vroom) 17; see Gaslin v. Agricult. Hall Co., L. R. 1 C. P. D. (C. A.) 482; Pearson v. Cox, 36 L. T. Rep. N. S. 495; L. R. 2 C. P. D. (C. A.) 369; Johnson v. Owen, 33 James 512; Ardesco Oil Co. v. Gilson, 63 Penn. St. 162; Mayor of Pittsburg, 46 Penn. St. (10 Wright) 213; see Godley v. Hagerty, 8 Harris, 317; Carson v. Godley, 2 Casey 111; DuPratt v. Lick, 38 Cal. 691; Robinson v. Webb, 11 Bush. 493; Erie v. Calkins, 85 Pa. St. 247; Ryder v. Thomas, 13 Hun. 296; Gilbert v. Beach, 4 Duer 423; Clare v. National City Bank, 8 Jones & Sp. 104; Brown v. Acrington Co., 3 Hurl. & Colt, 511; s. c. 34 L. J. (Exch.) 208; 13 L. T. (N. S.) 94; Vanderpool v. Husson, 28 Barb. 196; Dedford v. The State, 30 Md. 179; Clark v. Fry, 8 Ohio St. 358; Hall v. Johnson, 80 Ill. 185.

[3] Cuff v. Newark etc. R. Co. 35 N. J. L. 17, 574; States v. Mersereau, 64 N. Y. 138; Rapson v. Cubbitt, 9 M. & W. 710; s. c. Car. & M. 64; 6 Jur. 606; Overton v. Freeman, 11 C. B. 867; s. c. 16 Jur. 65; 21 L. J. C. P. 52; 3 Cur. & Kir. 52; see also Knight v. Fox, 5 Exch. 721; s. c. 14 Jur. 963; 20 L. J. Exch. 9.

[4] Butler v. Hunter, H. & N. 826; 31 L. J. Exch. 214; 10 W. R. 214.

men the rule is that the employer is not liable.[5] The rule applies under contracts by corporations as well as by private individuals, unless a statute intervenes. And the principles obtain in any independent employment,[6] as that of common carrier,[7] drayman,[8] master of a tugboat,[9] etc.

The test question in general is, does the relation of master and servant exist?[10] Where it does, liability attaches. Where it attaches in their absence, it is a subordination of the general rule to public policy.

The question as to who are servants or agents need not be discussed here. The intervention of a contractor, however, raises some difficulties. But it has been decided that payment by the employer of the contractor's servant's wages does not necessarily make the former their master;[11] nor the employment of a clerk to supervise the work;[12] nor the reservation of the right to dismiss the contractor;[13] nor that of refusing to pay unless satisfied.[14] Nor is a person the master of another whom the law compels him to employ.[15] Nor, in certain cases, one whom the the employer does not directly choose,[16] as where the owner of a carriage hires of a liveryman horses and a driver;[17] unless the owner directly selects the latter,[18] or directs him in a particular way causing injury.[19] Nor is one the servant of another who merely acts in a particular direction as to a particular matter where the nature and extent of duty on both sides arises from the exigencies of a common employment;[20] but he from whom the authority of both springs may be the common master.[21] Nor will the fact that the employer has a general right of supervision as to final results render him master necessarily;[22] as by an architect or engineer or other agent.[23] But such control may be agreed upon as will raise liability. Nor probably gratuitous meddling without authority from the contract, unless injury results directly. The following convenient tests have been suggested:[24] Had the employer the power of selecting the contractor's servants? Was he the party to pay them? Were they doing his work? Were they doing that work under his control in the ordinary way? Where these questions are answered in the negative, the relation of master and servant hardly exists. Yet the citations also show they are authoritative only when taken in their fullest signification.

But, on the other hand, payment of wages to the contractor's servants is a circumstance which may render the employer their master.[25] One who has control of the manner and mode[26] of doing the work is deemed

[5] 2 Black. 428; Hundhausen v. Bond, 36 Wis. 29.

[6] Cooley on Torts, (1879) 549; Harrison v. Collins, 86 Pa. St. 153.

[7] Thompson on Negligence and cases cited, Vol. II. 911, (1880).

[8] De Forrest v. Wright, 2 Mich. 368; McMullen v. Hoyt, 2 Daly, 271.

[9] Spraul v. Hemmingway, 14 Pick. 1; see Mullegan v. Wedge, 12 Ad. & El. 737.

[10] Pawlet v. Rutland etc. R. Co., 28 Vt. 297; McGuire v. Grant, 25 N. J. L. 357; Michael v. Stanton, 3 Hun. 462; s. c. 5 N. Y. S. C. (T. & C.) 634; Fenton v. Dublin Steam Packet Co. 8 Ad. & E. 835; Blake v. Ferris, 5 N. Y. 48; and cases cited above.

[11] Rourke v. White Moss Colliery Co. 1 C. P. Div. 556; Tibbits v. Knox & Lincoln R. Co. 62 Me. 437; and see Carbin v. Mills, 27 Conn. 274.

[12] Brown v. Colton Co. 3 H. & C. 511.

[13] Reedie v. R. Co., 4 Exch. 244; Blake v. Ferris, 5 N. Y. 48; Cuff v. R. Co. 35 N. J. L. 17; Robbinson v. Webb, 11 Bush. 466.

[14] Allen v. Willard, 57 Penn. St. 374.

[15] Steam Navigation Co. v. British etc. Nav. Co., L. R. 3 Exch. 330; see Smith, Master and Servant, 2nd ed. 205, 206; Lucy v. Ingram, 6 M. & W. 302; Hammond v. Rogers, 7 Moo. P. C. 160; Conservators of the Thames v. Hall, L. R. 3 C. P. 415. Not so when one is limited to a class only. Martin v. Temperley, 4 Q. B. 298; 12 L. J. Q. B. 129.

[16] Crockett v. Calvert, 7 Jur. 152; Samuel v. Wright, 5 Esp. 263; Michael v. Stanton, 3 Hun. 402, s. c. 5 N. Y. S. C. C. & C. 634.

[17] Saugher v. Forister, 5 B. & C. 547; Quarman v. Burnett, 6 M. & W. 499; 4 Jur. 969.

[18] See the cases cited under the general rule; see The Halley, 18 L. T. N. S. 879; 16 W. R. 998; 2 L. R. P. C. 193; 37 L. J. Adm. 33; 5 Moore P. C. C. N. S. 262.

[19] Quarman v. Burnett, 6 M. & W. 499; 4 Jur. 969; see Jones v. Chantry, 4 N. Y. S. C. (T. & C.) 63.

[20] Lucas v. Mason, 23 W. R. 924; 33 L. T. N. S. 13; 10 L. R. Exch. 251; 44 L. J. Exch. 145.

[21] Homan v. Stanley, 66 Pa. St. 464.

[22] Clark v. Hannibal etc. R. Co., 36 Mo. 202-218; Callahan v. Burlington etc. R. Co. 23 Iowa, 562; Eaton v. European etc. R. Co., 59 Me. 520; Reedie v. London etc. R. Co. and Habbitt v. London etc. R. Co., 4 Exch. 244-258; Erie v. Calkins, 85 Pa. St. 247; Reece v. Alleghany City, 79 Pa. St. 300; Pack v. New York, 8 N. Y. 222; Nevins v. Peoria, 41 Ill. 502; but see Harper v. Milwaukee, 30 Wis. 365.

[23] Robinson v. Webb, 11 Bush. 464; differing from Schwartz v. Gilmore, 45 Ill. 455; Erie v. Calkins, 85 Pa. St., 247; Hunt v. Penn. R. Co. 51 Pa. St.; Callahan v. Burlington etc. R. Co., 23 Iowa 562. Newton v. Ellis, 5 El. & Bl. 115; Slater v. Mersereau, 64 N. Y. 138 (5 Daly 455); Blake v. Hurst, 2 Hurl. & Colt. 20; s. c. 32 L. J. (Exch.) 189, 11 Week. Rep. 1031; 8 L. T. N. S. 251.

[24] Martin v. Temperley, 7 Jur. 230.

[25] Martin v. Temperley, *supra*; See Schuler v. Hudson R. Co. 38 Barb. 653.

[26] Newton v. Ellis, 5 El. & Bl. 115; Slater v. Mer-

the master and liable. So also with a contractor as to employees of sub-contractor. Where the usual elements of liability exist, it is no defense that the employer is compelled by law to select a contractor or servants from a prescribed class merely.[27] As said above, the nature of the employment is not material. Nor the fact that the servants are selected by a third party.[28] If the employer is at liberty to act in the particular matter, then the tort is imputable to the master.[29] It is not necessary that the authority be actually exercised. In certain cases a failure to do so may of itself lay the foundation for liability.[30] The circumstances may be such as to render both the employer and contractor liable.[31] Formerly the effort was made to found a distinction between the acts of servants with reference to personal and real property on the maxim: *Sic utere tuo ut alienum non laedas*;[32] but if the contractor commits acts which involve the employer, in matters pertaining to real property, it is because public interests, and not the distinction, raise such liability.[33]

The liability of the employer has been predicated on the relations between master and servant. There are exceptions, however, which go beyond these relations. Notwithstanding the primary principal has placed the work to be done in the hands of an independent contractor, he will still be liable if the thing contracted for is itself unlawful, or necessarily involves an illegal act.[34] So also if he is negligent in selecting an incompetent person.[35] So also if he has himself a duty to perform in regard to the work which he alone can do.[36] So also if injury to others is

sereau, 64 N. Y. 138; Blake v. Hurst, 2 Hurl. & Colt. 20; s. c. 32 L. J. Excb. 189; 11 Week. Rep. 1034; S. L. T. N. S. 251. See also Burgess v. Gray, 1 C. B. 578; s. c. 14 L. J. (C. P.) 184; Pearson v. Cox, 2 C. P. Div. 369; but see R. Co. v. Hanning, 15 Wall. 649; St. Paul v. Seitz, 3 Minn. 297; Cincinnati v. Stone, 5 Ohio St. 38: Chicago v. Janey, 60 Ill. 383; Sewall v. St. Paul, 20 Minn. 511; Murphy v. Caralli, 3 H. & C. 402; Quarman v. Burnett, 6 M. & W. 499; Stone v. Codman, 15 Pick. 297; Kimball v. Cushman, 103 Mass. 194; Pack v. New York, 8 N. Y. 222; Schwartz v. Gilmore, 45 Ill. 455; Chicago v. Sermady, 61 Ill. 431; Luttrill v. Hazen, 3 Sneed. 20.

27 Parsons on Contracts (6th ed.) vol. 1, p. 105, star paging, note h.; Martin v. Temperley, 4 Q. B. 298; Neptune the Second, 1 Dod. 467; but see Lucy v. Ingram, 6 Mee. & W. 302; also Carruthers v. Sydebotham, 4 M. & S. 77; Smith v. Coudry, 1 How. 28.

28 Dicey on Parties to Actions, (1879) 449; Blake v. Ferris, 5 N. Y. 49; 1 Seld; see also Kimball v. Cushman, 103 Mass. 194; Wood v. Cobb, 13 Allen, 58.

29 Wharton on Negligence, 2nd ed. sec. 183; see Holmes v. Mather, L. R. 10 Exch. 261.

30 Sawer v. Peate, 1 L. R. Q. B. Div. 321; 45 L. J. Q. B. Div. 446; 35 L. T. N. S. 321; Francis v. Cockrell, L. R. 5 Q. B. 184; Horner v. Nicholson, 56 Mo. 220; see Chicago v. Robbins, 2 Black. 418; see notes 35 to 41.

31 See Chicago v. Robbins, 2 Black, 418; 2 Thompson on Negligence, 908 (1880); Holt v. Whately, 51 Ala. 569; Shaw v. Crocker, 42 Cal. 435; French v. Donaldson, 5 Lans. 293; Robinson v. Chamberlain, 34 N. Y. 389; Fulton Ins. Co. v. Baldwin, 37 N. Y. 648; Adsit v. Brady, 4 Hill, 630; Conray v. Gale, 5 Lans. 344; Pfarr v. Williamson, 63 Ill. 15; Daegling v. Gilmore, 49 Ill. 348; Peyton v. Richards, 11 La. An. 62; Wharton on Agency, (1878) sec. 818; Lester v. Wabash Nav. Co., 14 Ill. 85; Hinde v. Wabash Nav. Co., 15 Ill. 72; Upton v. Lawrence, 17 C. B. 71. And see Klander v. McGrath, 35 Penn. St. 128; Keene v. Wensteer, 2 Sawyer, 348; Hawkesworth v. Thompson, 98 Mass. 77; Phelps v. Waite, 30 N. Y. 78; Michael v. Alestree, 3 Lev. 172; Parsons v. Winchell, 5 Cush. 592.

32 Bush v. Steinman, 1 B. & P. 404; Sly v. Edgely, 6 Esp. 6; Randleson v. Murray, 8 Ad. & E. 109; Lowell v. Boston etc. R. Co., 23 Pick. 24; New York v. Bailey, 2 Denio, 433; Stone v. Cheshire R. Co., 19 N. H. 427; Wiswall v. Brinson, 10 Ired. L. 554; Memphis v. Susser, 9 Humph. 760; Nashville v. Brown, 1 Heisk. 1; Silvers v. Medlinger, 30 Ind. 53; Meyers v. Snyder, Bright, 489.

33 Quarman v. Burnett, 6 M. & W. 499; Habbitt v. R. Co., 4 Exch. 254; Painter v. Pittsburg, 46 Penn. 213; Blake v. Ferriss, 5 N. Y. 48. See Holliday v. St. Leonards, 11 C. B. N. S. 209; also, 3 Am. L. Reg. N. S. 358; Pack v. New York, 8 N. Y. 222; Cuff v. Newark, etc. R. Co., 35 N. J. L. 17, 574; Kellogg v. Payne, 21 Iowa, 575; Allen v. Millard, 57 Pa. St. 381; Pawlet v. Rutland etc. R. Co., 28 Vt. 297; King v. New York etc. R. Co., 66 N. Y. 181; Ryder v. Thomas, 13 Hun. 296; Gilbert v. Beach, 4 Bosw. 423; Gandeor v. Cormack, 2 E. D. Smith, 254. In Reedie v. London and Northwestern R. Co., 4 Exch. 244, the doctrine of Bush v. Steinman, was expressly overruled. See Hilliard v. Richardson, 3 Gray, 349, for a review of some of the authorities.

34 Ellis v. Sluffield Gas Co., 2 El. & Bl. 767; Creed v. Hartman, 29 N. Y. 591; Cuff v. Newark etc. R. Co., 35 N. J. L. 17, 574; Water Co. v. Ware, 16 Wall. 566; Hall v. Sittingbourne etc. R. Co. 6 Hare. & N. 497; Hundhausen v. Bance, 36 Wis. 29; Lockwood v. New York, 2 Hilt. 66; Keegan v. Western R. Co., 8 N. Y. 175; Clark v. Fry, 8 Ohio St. 358; Upton v. Lawrence, 17 C. B. 71. See Gray v. Pullen, 5 B. & S. 970; Caswell v. Crabs, 120 Mass. 545. See notes 37, 38, 39, 41.

35 Lawrence v. Shipman, 39 Conn. 586, 589; Van Pelt v. Davenport, 42 Iowa, 308.

36 Gray v. Pullen, 5 Besv. & S. 970; Hale v. Sittingbourne etc. R. Co., 6 Hurl. & N. 488; s. c. 30 L. J. Exch. 81; 9 Weekly Rep. 274; 3 L. T. (N. S.) 750. And this would be true whether the duty were one imposed by common law or by statute; or by the contract in some cases. See Packard v. Smith, 10 C. B. N. S. 470; Mersey Dock's Trustees v. Gibbs, L. R. 1. H. L. 93, 114; Blackstack v. N. Y. & Erie R. Co., 20 N. Y. 48; McLean v. Burbank, 11 Miss. 277; Bower v. Peate, L. R. 1 Q. B. D. 321; Water Co. v. Ware, 16 Wall. 566; Milford v. Halbrook, 9 Allen, 21; Shipley v. Fifty Ass., 106 Mass. 194; Congreve v. Smith, 18 N. Y. 79; Congreve v. Morgan, 18 N. Y. 84; Starrs v.

likely to follow the performance of the work as contracted.[37] So also where there are public interests for which he is bound to provide.[38] If the work is lawful, but necessarily dangerous, he can not ordinarily shift the responsibility upon the contractor.[39] Both must bear it.[40] So also where the work contracted for is a nuisance.[41] And in general, for acts which are incidental,[42] or necessary,[43] or which should be foreseen by a reasonably prudent man,[44] the primary principal is held responsible. There is nothing in the nature of corporations to change the rule or its exceptions—unless, perhaps, to require greater strictness of application.[45] As to municipal corporations, the rule is they are liable for the negligence of their servants in business transactions.[46] Their relations with the public and the public character of their business prevents them from relinquishing responsibility as freely as the individual. But the same principle underlies both cases. Where the work performed by the contractor is one from which the municipal corporation derives emolument, liability for negligence therein necessarily attaches.[47] So also as to specific work performed by sub-employees and directed or ratified by the corporation.[48] So also when the municipal corporation has the exclusive care and control over public streets, liability can not usualiy be shifted upon a particular contractor, if the city has notice express or constructive of a nuisance caused thereby.[49] There are numerous cases where an officer is clothed by statute with distinct and independent powers, and in which for the performance of duties imposed by law, independent of the corporate assent, the corporation is held not liable, unless made so by statute.[50] Otherwise the general rule and its exceptions prevail.

Utica, 17 N. Y. 108; Creed v. Hartman, 29 N. Y. 960; Mullen v. St. John, 57 N. Y. 567; Clark v. Fry, 8 Ohio St. 358; Hundhausen v. Bond, 36 Wis. 1.

37 Bower v. Peate, 1 L. R. Q. B. Div. 321; 45 L. J. Q. B. Div. 446; 35 L. T. N. S. 321; Pitts v. Kingsbridge Highway Board, 19 W. R. 884; 25 L. T. N. S. 195.

38 See note 36, also 41.

39 Daniel v. Metropolitan R. Co., L. R. 5 H. L. 63; Bower v. Peate, 1 Q. B. Div. 321; Packard v. Smith, 10 C. B. (N. S.) 470. See Pearson v. Car, 2 C. P. Div. 369. See Brown v. Werner, 40 Md. 15. See Robbins v. Chicago, *supra*; Torry v. Ashton, 1 Q. B. Div. 314; Burgess v. Gray, 1 C. B. 578; 14 L. J. C. P. 184; Gray v. Pullen, *supra*; Scott v. Manchester, 1 H. & N. 59; 26 L. J. Exch. 132; 2 H. & N. 204; 3 Jur. N. S. 590; 26 L. J. Exch. 406. See notes 36, 37, 38, 41.

40 See note 31.

41 See Chicago v. Robbins, *supra*; McCafferty v. Spuyten Duyvil etc. R. Co., 61 N. Y. 178; Ryder v. Thomas, 13 Hun. 296; Osborn v. Union Ferry Co., 53 N. Y. 629. See Boswell v. Laird, 8 Cal. 49; Mayor N. Y. v. Bailey, 2 Denio, 445; Hilliard v. Richardson, 3 Gray 352; Cannes v. Citizens Co., 40 Barb. 380; Upton v. Sawnend, 17 C. B. 71; Gray v. Pullen, 5 B. & S. 970; Ellis v. Gas Co., 2 E. & E. 767; Water Co. v. Ware, 16 Wall. 566; Sabin v. R. Co., 25 Vt. 363; Congreve v. Morgan, 5 Duer. 495; Storrs v. Utica, 17 N. Y. 108; Congreve v. Smith, 18 N. Y. 79; Creed v. Hartmann, 29 N. Y. 591; Hardrap v. Gallagher, 2 E. D. Smith, 523; Silvers v. Nordlinger, 30 Ind. 53; Mercer v. Jackson, 54 Ill. 397; Detroit v. Cary, 9 Mich. 165; Hundhausen v. Bond, 36 Wis. 1.

42 Chicago v. Robbins, *supra*; Hundhausen v. Bond, 36 Wis. 1, Grimes v. Keene, 52 N. H. 330.

43 Storrs v. Utica, 17 N. Y. 104.

44 Storrs v. Utica, 17 N. Y. 104; Bower v. Peate, 1 L. R. Q. B. Div. 321; 45 L. J. Q. B. Div. 446; 35 L. T. N. S. 321; Packard v. Smith, 10 C. B. (N. S.) 470; Brown v. Werner, 40 Md. 15; Torry v. Ashton, 1 Q. B. Div. 314.

45 Pack v. New York, 8 N. Y. 222; Kelly v. New York, 11 N. Y. 432; Nevins v. Peoria, 41 Ill. 502, 515; Robbins v. Chicago, 7 Wall. 657; Palmer v. Lincoln, 5 Neb. 137; Buffalo v. Halloway, 7 N. Y. 493; St. Paul v. Seitz, 3 Minn. 297; Joliet v. Seward, 86 Ill. 402; Harper v. Milwaukee, 30 Wis. 365; Hannon v. St. Louis County, 62 Mo. 313. And see Drayton v. Pease, 4 Ohio St. 80; Erie v. Calkins, 85 Pa. St. 247; Bailey v. New York, 3 Hill, 531; 2 Denio, 433; Barnes v. District of Cal., 91 N. S. 540; and see Treadwell v. New York, 1 Daly, 123, for statement of general rule.

46 Foreman v. Mayor of Canterbury, L. R. 6 Q. B. 214; Grimes v. Keene, 52 N. H. 330; Hamburg Turnp. Co. v. Buffalo, 1 N. Y. S. C. 537; Hilsdorf v. St. Louis, 45 Mo. 94, 97; Ross v. Madison, 1 Ind. 281; Coates v. Davenport, 9 Iowa, 227; Templin v. Iowa City, 14 Iowa, 59; Deryoe v. Saratoga Springs, 1 Hun. 341; Delmonico v. New York, 1 Sandf. S. C. 222; Lloyd v. New York, 5 N. Y. 369; Carman v. New York, 14 Abb. Pr. 301.

47 Phila. v. Gilmartin, 71 Penn. St. 140.

48 See note 46; as to ratification, see McGrary v. Lafayette, 12 Rob. (La.) 668; 4 La. An.; Ross v. Madison, 1 Ind. 281; Thayer v. Boston, 19 Pick. 511; that liability may be raised by ratification, as in above cases, denied in Mitchell v. Rockland, 52 Me. 118, 125.

49 See Leavenworth v. Casey, McCohan (Neb.) 124; West v. Brockport, 16 N. Y. 161; note; McDonough v. Virginia City, 6 Nev. 90; Allentown v. Kramer, 73 Pa. St. 406; Clemence v. Auburn, 66 N. Y. 334; St. Paul v. Seitz, 3 Minn. 297; Milwaukee v. Davis, 6 Wis. 377. But see Call v. Medina, 27 Barb. 218; Peck v. Batavia, 32 Barb. 634; and see New York v. Furze, 3 Hell, 612; Donohue v. New York, 3 Daly, 65; Niels v. Brooklyn, 32 N. Y. 489; Clark v. Peckham, 9 R. I. 455; Lloyd v. New York, 5 N. Y. 369; Barton v. Syracuse, 36 N. Y. 54; Richardson v. Boston, 19 How. 263; Harper v. Niel, 30 Wis. 365; Child v. Boston, 4 Allen, 41; O'Brien v. St. Paul, 18 Minn. 176; Sumner v. St. Paul, 23 Minn. 408; Perry v. Worcester, 6 Gray, 544; Sprague v. Worcester, 13 Gray, 193; Chicago v. O'Brennan, 65 Ill. 160; Fiori v. St. Louis, 2 Mo. App. 231. As to notice, see Darlan v. Brooklyn, 46 Barb. 604; Chicago v. Robbins, *supra*; Wharton on Neg., 2d ed., § 194.

50 Morgan v. Hallawell, 57 Me. 377; see Mitchell v. Rockland, 52 Me. 118; Bigelow v. Randolph, 14 Gray, 541; Eastman v. Meredith, 36 N. H. 284.

It will thus be seen that in general when work is committed to a competent contractor from which, if properly done, no injurious consequences can arise, the party authorizing the work is exempt from liability for injury resulting from negligence which he had no reason to anticipate, because: 1—He has done all a prudent man can be required to do; 2—the workmen are not his servants. That there are at least four exceptions or modifications of the rule, under which the primary principle is held liable where: 1—He has been negligent in selecting an incompetent contractor; 2—The work to be done is itself wrongful, a nuisance, or likely to result in injurious consequences; 3—A duty rests upon him which the law does not allow him to shift; 4—The act or injury complained of is incidental to the fulfillment of the contract. There is no arbitrary rule determining what is incidental to the work, but a liberal interpretation of language is followed. And the act complained of may be ratified raising liability.[51]

FRANK C. HADDOCK.

Milwaukee, Wis.

[51] McLaughlin v. Pryor, 4 M. & G. 48; Perkins v. Missouri, etc. R. Co., 55 Mo. 201. But see Coomes v. Houghton, 102 Mass. 211.

TRADE MARKS — SIMILARITY — PROOF — INTENT.

LIGGETT, ETC. TOBACCO CO. v. HYNES.

United States Circuit Court, W. D. Arkansas, July 15, 1884.

Though a mark be so made as not to deceive the trade, yet if there be a danger that the goods which bear it will be taken for other goods bearing a trade mark which has created a reputation for the latter, the use of the former will be enjoined, though no proof of any case of actual deception, or of any intention to deceive, be produced.

Paul Bakewell for complainant.

This is a bill in equity, brought here on account of citizenship of respective parties, to perpetually restrain defendant from using the mark attached to "complainant's exhibit, Robert S. Hynes' Plug Tobacco," on plug tobacco, complainant claiming to have an established right to the use of the mark of a star affixed to plugs of tobacco as a trade-mark, and complainant's mark is shown on "complainant's exhibit, Liggett & Myer's Plug Tobacco."

The complainant claimed that its said plug tobacco has acquired a great reputation in the trade throughout the United States, and large quantities of the same are constantly required from it to supply the regular demand for the consumption of the country; that its said plug tobacco, by reason of the peculiar distinguishing mark of a star fastened upon it, has become known and distinguished by the trade and public as "Star" plug tobacco, so as to be named and called for by the trade and public in purchasing plug tobacco as "Star" tobacco; and that it was the original manufacturer of plug tobacco with the figure or design of a star affixed to the plugs of tobacco, and the first to introduce the same to the public; that Robert S. Hynes is manufacturing and selling at Van Buren, Arkansas, plug tobacco to which is affixed a mark resembling a star, calculated to mislead the trade and the public, and induce the purchase of his plug tobacco marked as aforesaid, as "Star" tobacco; that its rights are in danger of interference, that it is in danger of loss in its business, in this, that the plug tobacco manufactured by it, which, on account of the skill and fidelity with which it has conducted the manufacture of it, has found favor and is in great demand, and which has become known to the trade and public as "Star" tobacco, is likely to be mistaken for the plug tobacco manufactured, sold and marked as aforesaid by said Hynes, to the extent of answering a call for "Star" tobacco; and that thus, on the reputation established by it for "Star" plug tobacco, the plug tobacco manufactured by said Hynes is likely to obtain ready sale, to its manifest injury; that it has notified said Hynes to desist from further use of said mark used by him; but he still continues to use the same on his plug tobacco.

The defendant denied that they were deceiving the public, but that they were manufacturing a plug tobacco called "Snow Drop" tobacco, the mark he used on his plugs.

PARKER, D. J. delivered the opinion of the court:

The law is well settled, that a party who has appropriated a particular trade-mark to distinguish his goods from other similar goods, has a right or property in it which entitles him to its exclusive use, and that this right is of such a nature that equity will protect it by injunction from innovation. Hostetter v. Van Winkle, 1 Dillon 329.

The leading principle upon which the law of trade-mark is based, is, that the honest, skillful and industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption, that has found favor with the people, and who, by affixing to it some name, mark, device or symbol which serves to distinguish it as his, and to distinguish it from all others, has furnished his individual guarantee and assurance of the quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry or enterprise, and shall in no manner and to no extent be deprived of the same by another, who, to that end, appropriates and applies to his productions the same or a colorable imitation of the same name,

to return them to the company from which it received them.

Most generally such cars were returned empty. There is evidence, however, that tends to show it was the common understanding among the companies doing business at this point, if other shippers desired cars, defendant without any specific order to that effect, was at liberty to place them at their places of business to be loaded, and when loaded, they would be returned to the company owning such cars to be shipped.

At all events, it appears that cars were so handled, and the companies concerned seem to have acquiesced in that mode of doing business. On October 25th, 1881, a car belonging to plaintiff, was brought to the City of Peoria, loaded by the Peoria & Rock Island Co., a road operated by the plaintiff, and was placed on the transfer track, and the agent who acted for the Rock Island roads, ordered it to be switched to the Monarch Mills or Distillery.

On the 27th of that month it was taken by defendant to the distillery, where it was unloaded by the consignee and on the same day it was taken by defendant from the distillery to the Peoria Sugar Refinery, to be loaded and then switched to the transfer track for shipment by the plaintiff. In the afternoon of the same day the refinery was burned, and also this car which was standing in close proximity. There was no order from plaintiff to take this car to the refinery for any purpose, and it is not shown that it had any knowledge that defendant intended to do so.

The propositions of law certified by the appellate court when resolved involve the single inquiry whether the defendant in the transaction out of which this action arose, bore to plaintiff the relation of a common carrier, or was it that of a bailee or that of a warehouseman. When the true relation of the parties shall be ascertained the law fixes the extent of defendant's liability, if any exists, unless it shall be found that defendant was a common carrier as to this car, no liability would rest upon it for the loss, as no negligence is imputed to defendant.

The question presented is one of first impression in this court, nor have counsel cited any case where the exact question involved was considered by any court of last resort. It leaves this court free to determine the law on principle as it shall be thought best to subserve public interests, as well as the private interests of corporations concerned.

No proof is needed to show the extent and the importance of the interests involved in the decision. It is a matter of so much public concern that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if indeed it would be possible, to transact the commercial business of the country. Freights for shipment across the continent could not well be stopped at the terminus of each carrier's line and reshipped in cars of the connecting carrier. That would occasion more delay than the necessities of commerce would tolerate. The extent of the usage in regard to the exchange and transportation of cars among so many different railroads would seem to require such exacting rules and regulations as would insure the strictest accountability on the part of companies that may transfer or haul cars over their respective roads.

The statute of this State, that forbids "extortion and unjust discrimination" by railroad companies, would seem by its provisions to recognize that railroad companies may be common carriers of "cars" as well as of freights, for such a corporation is not only forbidden to make any unjust discrimination in its charges for the transportation of passengers or freights of any description, but for the use and transportation of any railroad car upon its road.

And why may there not be such a thing as a common carrier of cars either with or without its load of freight. As to the freights the car contains, it will be conceded such carrying roads are common carriers, and are subject to the strict liability of such carriers, and as has been seen by a constitutional provision, all the rolling stock and other movable property belonging to a railroad in this State shall be considered personal property. What reason exists for discriminating against this class of personal property, and for holding that railway companies carrying it shall not be regarded as common carriers? The mode of moving it whether on wheels or in carriages, ought not to be the foundation of any distinction. In either case, the property is in the exclusive care and control of the carrier, and there is as much reason arising from public considerations, why such a carrier should be held to the strict liability of an insurer for the safety of the property in the one case as in the other.

The facts in the present case show a strong necessity for imposing the liability attaching to a common carrier. The car in question was delivered to defendant, to be carried over its road to the warehouse of the consignee of the freight it contained. A charge for the service to be rendered was made and paid by the consignee. The undertaking was also to return the car to the company from which it had been received, and the charges collected, or to be paid included the latter service. Thus it is seen defendant had the exclusive control of the car while on its track, while in course of transportation to the consignee, and that control would seem to be as absolute as over any package of freight it might have to carry or otherwise deliver. Plaintiff had parted with the care and custody of the car, and could not at any point on defendant's road, interfere for its safety. Its care was entrusted to defendant as fully as was the freight it contained. The under-

taking of defendant in regard to moving the car was within the scope of the general business it had engaged to do for the public, and it would seem no reason exists why the liability for the safe delivery of the car should not be the same as with respect to the freight it contains, which it is conceded is that of a common carrier. On what principle may defendant be considered a common carrier as to freights on its road, and not as to the car containing it, which it is moving over its road with its own propelling power.

The law as has been seen, makes all railways in this State public highways, open to the use of all persons for the transportation of their persons or property, under such regulations as may be prescribed by law, and it is apprehended, it is unlawful to make any discrimination as to the property offered to be carried, or as to whether it belongs to a private person or to a corporation. If it is such property as is capable of being carried with the means ordinarily employed by such carrier, the obligation is imperative, and the carrier must receive the property and carry it with safety in the way such property is usually carried, and any failure to do so will subject the carrier to damages.

The only case to which the attention of the court has been directed having any features like the one considered is Malloy v. Tioga R. Co. 39 Barb. 488. In that case the defendant company, which it is conceded was a common carrier as to freights and passengers engaged to furnish plaintiff the motive power to draw his cars loaded with his property over its road, the plaintiff being obligated to load and unload his cars, and furnish brakemen to accompany them, but who were subject to the control of defendant's conductor, and it was held defendant assumed the liability of a common carrier, and consequently was liable for injuries to plaintiff's cars and property not caused by inevitable accident or public enemies. But aside from authority, the conclusion reached on principle is, defendant occupied the relation of a common carrier as to the car of plaintiff in its possession, as well as the freight it contained, and as such was liable for its safe return to plaintiff unless its loss occurred from causes which exempt common carriers, which is not claimed in this case.

Judgment affirmed.

NOTE.—The foregoing opinion was announced several months since, but we have seen no such special reference to it in legal periodicals as the importance and far-reaching consequences of the rule laid down by it would seem to warrant. This rule makes every railroad transfer company of Illinois though limited in its operations to transfer work in a single city and its suburbs, liable as an insurer, except for the acts of God and of the public enemy, for all cars empty or loaded which it undertakes to move for other companies from one point to another, until such cars are safely redelivered to the company from which they were received. The *dicta* of the opinion would fix the same measure of liability upon companies operating trunk lines across the State.

We think it safe to say that among railway managers and their legal advisers it has not been generally understood that so high a degree of responsibility existed, even in the case of city transfer companies.

In Hutchinson on Carriers, § 47, a common carrier is defined to be "one who undertakes as a business for hire to carry from one place to another the goods of all persons who may apply, provided the goods be of the kind which he professes to carry, and the persons so applying will agree to have them carried upon the lawful terms prescribed by the carrier, and who, if he refuses to carry such goods for one who is willing to comply with such terms becomes liable to an action by the aggrieved party for such refusal."

The court in the principal case say that their attention has not been called to any decided case in point except the one in 39 Barb, but Spears v. R. Co., 67 Barb. 518, is a stronger ruling in favor of the doctrine of the principal case and both these cases were affirmed in the court of appeals, and N. J. R. Co. v. Pa. R. Co., 3 Dutch, 100, and Vt. & Man. R. Co. v. Fitchburg R. Co., 14 Allen, 462, are in point and support the *dicta* in the principal case, to a certain extent. See also The Rogers etc. Works v. Erie R. Co., 5 C. E. Green 379; N. Y. Cent. & H. R. Co. v. Standard Oil Co., 87 N. Y. 486; Hannibal R. Co. v. Swift, 12 Wall. 262; Angell on Carriers, sec. 78 n; Schouler on Bailments, 328; 2 Rorer on Railways, 1222. In view of its special facts we can assent to the decision in the principal case, believing that the statutes of Illinois relating to connecting railroads, do not fairly apply to a city transfer company, but to the *dicta* in the opinion relating to trunk lines we must dissent. Take for example a line of railway extending from the east boundary of Illinois to its west boundary. We contend that there is nothing which will make the company owning or operating that line liable to an action which is the true test, for refusing to haul the loaded or empty cars of a connecting company from one border of the State to the other. If a company sees fit to take into its possession the cars of foreign companies and haul them across the State without any special contract, the service being optional, it is liable only as a bailee, and the principle does not apply that a carrier receiving goods for transportation without any special contract, must be deemed to have assumed the liability of a common carrier, for that principle only applies to cases where the carrier is liable to an action for refusing to carry the goods, although the party tendering them declines to make any special contract.

The answer to a claim that the Illinois corporation assumes the liability of a common carrier with respect to such foreign cars is plain without reference to the statutes. It was not organized to transport bodily the cars and their contents, often sealed up, of other and rival companies, but it provides its own freight cars for which it attempts to find use, and we know of no principle of the common law which would compel one carrier to transport not only the goods of another and perhaps hostile carrier, but also the vehicles in which they were contained, while his own vehicles were rotting for want of employment. It is true that it is generally for the interest of connecting lines to arrange for a through transit, but it is easy to imagine a case where it would not be, and in the absence of prohibitory legislation, as in the case of Illinois, railway corporations may refuse to transport merchandise except in their own cars. The corporation is not organized to haul the cars of other corporations except as it may agree; it does not profess to do that kind of business, it can frame no rules applicable to all other companies for that kind of business, and it is not bound to destroy its own business to build up that

of a rival. In the principal case the court refer to the practical inconvenience which would follow if goods crossing the continent were to be subjected to the delay and expense attendant upon reloading them at the end of each of the connecting carriers routes. If the rivalries of commerce cannot be depended on to correct such an evil, there is no remedy except by legislation that shall not trench on chartered rights, under the contract and commercial clauses in the Federal Constitution, and the views we have taken of this question are fortified by the course of legislation in the different States.

In Indiana as in Illinois, the matter is left to the mutual arrangement of the connecting companies. (R. S. Ind. 1881, sec. 3999.) In Rhode Island, the company which reloads with its own cars is not allowed to make any additional charge. (R. S. R. I. 1882, p. 408.) In New York, New Jersey and Ohio, companies are required to have foreign loaded cars, but allowed to charge local freight. R. S. N. Y. 1882, p. 1558; R. S. N. J. Vol. 2, p. 952; R. S. Ohio, 1880, sec. 3341.) In Michigan it is provided that at all reasonable times and for a reasonable compensation the railroad corporations of that State shall draw the cars and merchandise of other corporations having connecting tracks of the same gauge, if the cars are in good order and properly loaded, provided that such corporations shall not be required to haul the cars of stock car-loading companies. R. S. Mich. 1882, sec. 3299. Similar statutes will be found in Maine, Massachusetts and Iowa. R. S. Me. 1883, ch. 51, sec. 40; P. S. Mass. 1882, ch. 112, sec. 188; R. S. Iowa, 1882, p. 355. And so in most of the remaining States there has been more or less legislation on this subject. In England if the companies cannot agree, the matter is left to the control of the Board of Trade. Browne on Carriers, 239; Ivatt on Carriers, 1093. While the law of carriers was one of the latest outgrowths of the common law, yet principles which seemed of universal application as late as the time of Lord Holt have been found too narrow in this age when steam and electricity are the motors in carrying merchandise and messages.

Hence the legislation to which we have referred, would be superfluous if the *dicta* referred to were maintainable, but such legislation indicates clearly the views which the law-makers throughout the Union are taking of the question under discussion, and their construction of the new rights and duties relating to this subject which have sprung out of unanticipated changes in the carrying trade.

H. K. WHITON.

Chicago, Ills.

CRIMINAL LAW—DISTINCTION BETWEEN TRESPASS AND LARCENY—FELONIOUS INTENT—QUESTION OF LAW.

JOHNSON v. STATE.

Supreme Court of Alabama.

1. Where the facts are indisputed in a prosecution for larceny, the question of intent is one solely for the court, and not for the jury.

2. To constitute the crime of larceny, there must be a felonious intent, and when one openly takes the goods of another, in the presence of several parties, under no claim of right, with the purpose of appropriating the same to his own use, but to partially satisfy a debt due from the owner's father, and which he considered the owner should pay, and made no attempt to conceal anything, the act was but a mere trespass, and a prosecution for larceny is improperly brought.

Appeal from Macon County Court.

SOMERVILLE, J., delivered the opinion of the court.

The defendant was convicted of petit larceny in the court below on the following state of facts. The prosecutor had purchased a package of coffee and a piece of meat, valued at about sixty cents, which were on the counter of a store, kept by one Varner, who was a merchant. The father of the prosecutor had employed defendant as a day laborer on a farm, and owed him the sum of one dollar and sixty cents for which he had given defendant an order on Varner, which the latter, as drawee, declined to pay on the ground that he owed the drawer nothing, and that the order was drawn on him without authority. The defendant, thereupon, insisted on the prosecutor's paying the amount, it appearing that he also was working on the father's farm. This the prosecutor peremptorily declined to do, with an oath, and walked off leaving the goods on the counter, and ordering defendant and his own brother, who was present, to take the articles and carry them to his, (the owner's) house. Defendant then, in presence of the brother, and of Varner, and several others, openly picked up the packages charged to have been stolen, and walked out of the store with them, remarking that he did not believe he would ever get his pay, and that he would take the goods and save that much.

The question presented is whether this was a larceny, or a mere trespass. The line of demarcation between the crime and the mere civil tort, in this class of cases, is in many instances very difficult of distinction. It is a general rule, sometimes said to be liable perhaps to a few exceptions, that every larceny necessarily involves a trespass. Edmonds v. The State, 70 Ala. 8; S. C. 45 Am. Rep. 67. Yet it is a principle, coeval with the origin of our system of criminal jurisprudence, that a mere trespass, committed by taking personal property, is not a crime unless it is perpetrated feloniously—that is *animo furandi*, or with the intention to steal. 4 Black. 281. The wrongful act, according to the better view, must be infected with an intention that is furtive and fraudulent in its nature, which, in all cases, entirely free from doubt and conflict of evidence, may be determined by the court, otherwise by the jury. 3 Green. Ev. (14th Ed.) sec. 157; Green v. The State, 68 Ala. 539; Rex v. Cabbage, Russ. & Ry. 292.

It was long ago said by high authority that "if a man take away the goods of another openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner, or of other persons who are known to the owner." 2 Russ. Cr. (9th Ed.) 158. This language is quoted in substance by the

learned author from Lord Hale's Pleas of the Crown, written more than two centuries ago. Hale P. C. 509. This rule was fully approved by this court in Rountree v. The State, 58 Ala. 381. See also 2 Whart. Am. L. (6th Ed.) sec. 1786; 2 East P. C. 661. We adhere to this principle although it does not seem to be announced, in its broadest scope by some of our American text writers, at least in the more recent editions of their works on criminal jurisprudence. 2 Bish. Cr. L. (7th Ed.) secs. 840, 758; 1 Whart. Cr. Law (8th Ed.) sec. 883 *et seq.* But see 2 Whart. Am. Cr. Law (6th Ed.) sec. 1786.

The facts of the present case did not, in the light of this principle, constitute larceny. The taking was open and in the presence of the prosecutor's brother, who had constructive custody of the goods, and several others were also present. It had no element of secrecy or furtiveness such as usually characterizes the crime of theft, nor was there any subsequent attempt to conceal the property taken. The fact that the goods were seized by defendant to satisfy his claim for wages, would not, perhaps, it is true, amount to such *bona fide* color of claim as to be sufficient in itself and alone, clearly to rebut a felonious intent. This, however, in a similar case has been held a question of sufficient doubt to be submitted to a jury. Com. v. Stebbins, 8 Gray (Mass.) 492. But it is admissible to explain the intent in connection with the unconcealed and open character of the seizure, and these two concurring facts, when taken together, show the act to be a trespass merely and not a larceny, thus rebutting the suspicion that the assertion of claim was a trick to color a felony, using the language of Lord Hale, who observes that "the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it." 1 Hale, P. C. 509. The rulings of the court were in conflict with this view of the law, and were in our judgment erroneous.

The case of McMullen v. The State, 52 Ala. 551, while fully recognizing the foregoing principle, lays down the rule that the question of intent in all cases of this character must be left to the jury. The better rule, as we have said above, is that in all cases free from doubt, where the evidence is not conflicting, the whole question is one for the court. Where the facts are disputed, and the inference to be drawn is not clear, it should be left to the determination of the jury. Green v. The State, 68 Ala. 539. On this point McMullen's Case, *supra*, must be overruled.

The case of McCourt v. The People, 64 N. Y. 583, is an authority in full accord with these views. There the defendant stopped at the prosecutor's house and asked for some cider, for which he offered to pay. It was refused him by the prosecutor's daughter, and he thereupon openly took the cider in the presence of her and of another. The court refused to sustain a conviction saying: "Every taking by one person of the property of another, without his consent, is not larceny; and this, although it was taken without right, or claim of right, and for the purpose of appropriating to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. It would in the absence of such intent, be a bare trespass, which, however aggravated, would not be crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury."

The court should in this case have given the general charge, that if the jury believed the evidence, they should acquit the defendant. The facts in evidence did not authorize the inference of the requisite *animus furandi*, or criminal intent to steal.

Reversed and remanded.

WEEKLY DIGEST OF RECENT CASES.

1. ACTIONS—TWO ACTIONS FOR SAME TORT.
Two actions may be brought simultaneously one against the officer, the other against the creditor making a wrongful attachment. There is no obligation on the plaintiff to elect or join them. *McAvoy v. Wright*; *Same v. Drew*, S. J. C. Mass Mass. L. Rep.; July 17, 1884.

2. APPEAL—FLIGHT FROM JURISDICTION.
When a person who has been convicted of a criminal offense takes an appeal to an appellate court and pending such appeal breaks jail and withdraws himself from the jurisdiction of the court, the appeal will be dismissed on motion and not heard unless such fugitive again submits himself to the jurisdiction of the court by returning to the custody of the proper officer of the law. *Warwick v. State*, S. C. Ala. 3 Ala. L. J. 120.

3. ATTACHMENT—LETTING ON SHARES—INTEREST OF LANDLORD.
The interest of a landlord in the crops of his land let on shares can not be attached while they are in the ground so to give title to it as against a subsequent purchaser of the land on execution against the land owner. *Long v. Green*, S. C. Pa. 14 Pitts L. J. 490.

4. COMMON CARRIER—PASSENGERS—MISTAKE IN PURCHASING TICKET—EXPULSION OF PASSENGER—DUTIES OF PASSENGER.
1. Where a passenger goes on a train with the assurance of the railroad's ticket seller that his ticket is good from S to N there being nothing on the ticket to indicate anything to the contrary, the conductor has no right to expel him, upon the tender of the ticket indicating to him by its punches that it could be used only from P to N, and the passenger was not bound to pay his fare.

2. The fact that the conductor made the request for fare in good faith, offering to give him a receipt stating the circumstances did not exculpate him, and the company is liable for full damages for the expulsion. *Murdock v. B. & A. R. Co.*, S. J. C. Mass., Mass. L. Rep. July 31, 1884.

5. CRIMINAL LAW—LOTTERY—POLICY GAME.
The carrying on the game popularly known as the "policy or envelope game" is setting up a lottery within the meaning of the statute. *Com. v. Wright*, S. J. C. Mass.; Mass. L. Rep., July 31, 1884.

6. EVIDENCE—GENERALITIES—CONCLUSIONS FROM FACTS.
A witness may testify that he saw a game played with cards, or participated in the game, without giving a particular description of the game. *Johnson v. State*, S. C. Ala. May, 1884.

7. EVIDENCE—PAROL—CONTRACT—LATENT AMBIGUITY.
Where the contract was that S was to saw lumber for H "at the price of two dollars per thousand feet to include thirty feet logs." *Held*, that the "per thousand feet" in the written contract is a latent ambiguity not appearing in the face of the instrument and may be explained by oral proof. *Smith v. Aiken*, S. C. Ala. 3 Ala. L. J. 114.

8. EVIDENCE—PART COMPETENT AND PART INCOMPETENT.
When a party offers evidence as a whole, parts of which are incompetent and inadmissible, the court is not required to separate the legal from the illegal portions, but may exclude the whole of it. *Warren v. Wagner*, S. C. Ala. May, 1884.

9. EVIDENCE — PRIVILEGED COMMUNICATIONS — CREDITOR TO OFFICER.
The communication from the plaintiff's attorney in an attachment suit to the officer making the attachment, regarding the same, is in no wise privileged. *McAvoy v. Wright*; *Same v. Drew*, S. J. C. Mass. Mass. L. Rep. July 17, 1884.

10. EVIDENCE—REBUTTAL OF CHARGE OF FRAUD—ADMISSIBILITY OF RENT RECEIPTS.
In a suit for conversion of goods on attachment against a stranger, wherein the charge of a fraudulent sale to the plaintiff is made and a *bona fide* transfer of title denied, he may in rebuttal show in evidence rent receipts for money paid by him for the storage of the goods with the receiptor. They are part of the transaction of storing. *McAvoy v. Wright*; *Same v. Drew*, S. J. C. Mass. Mass. L. Rep. July 17, 1884.

11. EVIDENCE—VALUE—TIME.
In a controversy regarding the value of a wagon, its value four months before may be shown. *McAvoy v. Wright*; *Same v. Drew*, S. J. C. Mass; 7 Mass. L. Rep. July 17, 1884.

12. FALSE IMPRISONMENT—VOID PROCESS—LIABILITY OF JUDGES—LIMITATIONS.
Where the time for prosecution of a crime is limited and it appears on the face of the complaint that such time has expired, the process issued thereon is absolutely void, and the justice issuing the same is liable for the arrest and imprisonment of the accused, although it was made to appear to him that the offence was but just discovered. *Vaughn v. Congdon*, S. C. Vt.; Reporter's Advance Sheets.

13. FRAUD—ACTS OF ALLEGED FRAUDULENT VENDOR.
In a controversy whether a sale was made with intent to defraud creditors, an offer to sell the property to some one else, made by the plaintiff's vendor after the sale and without the plaintiff's knowledge cannot be shown. *McAvoy v. Wright*, *Same v. Drew*, S. J. C. Mass. Mass. L. Rep. July 17, 1884.

14. INSURANCE — NOTICE OF LOSS — JOINDER OF DEFENDANTS.
Where two insurance companies join in issuing a policy against loss by fire, in which the several liability of each is distinctly set forth, and a loss occurs, they may be joined as defendants in an action to recover the loss; and a notice of such loss, addressed to one of such companies, but delivered to the agent of both, is equivalent to a notice to both. *Bernero v. Ins. Cos.* S. C. Cal. July 18, 1884, 3 W. C. Rep. 292.

15. JURISDICTION — INJUNCTION — PROPERTY IN OTHER STATES.
A, having purchased of B a tract of land in Illinois, and taken his deed for it, discovered that the deed was so defectively acknowledged that it could not be recorded there; B on learning this was trying to take advantage of it by selling the land a second time to an innocent purchaser. *Held*, a court of equity in Kentucky has jurisdiction to enjoin B from making the sale, he being within the process of the court, although the land was not. *Frank v. Peyton*, Ky. Ct. App. May 31, 1884; 16 Chic. L. N. 377.

16. LEASE—EVICTION FROM PART OF LEASED PREMISES—RENT.
An eviction of the lessee from a part of the premises, by title paramount, discharges his liability for rent *pro tanto*; but such eviction by the act of the landlord himself discharges the rent entirely during its continuance. *Warren v. Wagner*, S. C. Ala. May 1884.

17. MORTGAGE—ENTRY OF SATISFACTION—MISTAKE.
A satisfied of record a mortgage by mistake. *Held*, that this was not an actual satisfaction, as the recorder's act in giving his permission to enter satisfaction is not a judicial act. *Brown v. Henry*, S. C. Pa. Apr. 21, 1884; 14 Pitts. L. J. 483.

18. NEGLIGENCE—CONTRIBUTORY.
Riding or stepping upon the front platform of a horse car when in motion is not negligence *per se*. *McDonough v. Metropolitan R. Co.*, S. J. C. Mass. Mass. L. Rep. July 17, 1884.

19. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—WHAT IS.
Riding over a railroad track in a wagon, without stopping the horse to listen for the cars, is not in a boy fourteen years of age negligence *per se*. *Tyler v. N. Y. & N. E. R. Co.* S. J. C. Mass. Mass. L. Rep. July 17, 1884.

20. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — MINOR.
A boy who is riding on the runners of a sleigh in a public street, and suddenly leaving the same is knocked down by the horse in the following sleigh, is guilty of contributory negligence as matter of law. *Messenger v. Dennie*, S. J. C. Mass. 18 Rep. 111.

21. STATUTES—CONSTRUCTION OF STATUTE IN NATURE OF EXEMPTION LAW.
Statutes allowing the life of the husband to be insured for the benefit of the wife, free from the

claims of his creditors, are in the nature of exemption laws, and are to be liberally construed. *Felvath v. Schonfield*, S. C. Ala., 3 Ala. L. J. 128.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

19. B owned land—leased it to C for a term of years with option in the lease terms to purchase on a credit, for a stipulated sum, executing purchase money notes therefor, payable to B in the future—at a time named. B, during the lease term made will and died, up to which time C had not exercised his right to purchase, and had executed no purchase moneynotes to B; but B, under the belief that C had done so, made disposition of the supposed notes of C as legacies to various persons. What rights have such persons, under the will? But further—After the death of B, C during the lease term, exercised his option to buy—did so—and executed his notes payable to B's executor at the time agreed on between B & C. Then what are the rights of the legatees of the supposed notes under the will of B? W., H. & W.

20. W, a resident of Illinois, owning land in Minnesota, executed and delivered to H an instrument in the following form: "We, W, of Cook County, Illinois, and A W, his wife, in consideration of the sum of $1500 in hand paid, convey and warrant to S—the following described real estate, to-wit: (here follows a full and sufficient description of the land) hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State." The instrument was duly signed, sealed, witnessed and acknowledged by W and wife in Illinois. What is the legal effect of the instrument? Is it sufficient as a deed to convey W's title to S? E. S.

RECENT LEGAL LITERATURE.

SPAULDING ON PUBLIC LANDS. A treatise on the Public Land System of the United States, with reference to the land laws rulings of the departments at Washington and decisions of courts and an appendix of forms in United States land and mining matters. By George W. Spaulding of the Sacramento Bar, San Francisco; A. L. Bancroft & Co., 1884.

This volume was prepared with a view of furnishing in a compact and convenient form a reliable work upon all the subjects embraced under our public land system. All the statutes upon the subject of public land and all decisions upon them are collected in thirty-nine chapters. As the book was mostly prepared by those who framed the statutes and revised them, it seems unnecessary to say that its quality is good. It will serve a useful purpose for those who are interested in the subject. It contains a large number of forms, and is provided with a good index.

WARRANTIES IN THE SALE OF CHATTELS. A treatise on the Law of Warranties in the Sale of Chattels. By Arthur Biddle, one of the authors of a Treatise of the Law of Stock Brokers, Philadelphia; Kay & Bro., 1884.

This is the first American book, we believe, which has ever appeared upon this subject, and it is a thorough one. There is nothing remarkable in the book, but the treatment of the subject shows a careful study of it and honest work. The author believed that the books on Sales did not treat it exhaustively enough, and it would seem from the treatment he gives it, that his opinion is undoubtedly correct. The book is written in somewhat the same style as Benjamin on Sales, and divided into five chapters upon the Nature of Warranties; Express Warranties; the Implied Conditions of Existence, Identity, and Manufacture; Implied Warranties; and Remedies of the Parties. A thorough index finishes the work. About 750 cases are cited. The book is printed in large bold type and the mechanical work is otherwise well done.

CHURCH ON HABEAS CORPUS. A treatise of the writ of *Habeas Corpus* including Jurisdiction, False Imprisonment, Writ of Error, Extradition, *Mandamus*, *Certiorari*, Judgments, etc., with practice and forms. By William S. Church, of the California Bar, San Francisco; A. L. Bancroft & Co., 1884.

The author has written a treatise upon "the most celebrated writ known to the law," and indulged in very little laudation of "this great bulwark of personal liberty"—"the birth right of civil liberty handed down to us from the fathers of the law." He has "preferred simply to present the law as found in judicial decision and legislation and to leave the reader to his own reflections concerning the enhanced state of personal liberty now, compared with what it was away back in the night of English history." He urges that there is "no need to lavish praises upon this 'glory of the English law.' Rather let the united multitude of decisions show the fountain whence flows the law that makes man free, when unjustly deprived of his personal liberty." The treatise is divided into thirty-seven chapters. Their arrangement is good. Whenever something new is treated, it is announced by caption words. The writer has an easy, readable style. All the "modern conveniences" are furnished the reader. The index is good. Twenty-two pages of forms appear at the end of the book. There seem to be but eighteen

hundred cases, which is certainly a small number for a treatise of six hundred and fifty pages, exclusive of index or table of cases. The investigations of the author seem to have been completed at a late day, as we observe that Robbs' case receives its share of the author's treatment of the subject. This book is a timely one. The subject is a growing one, and the profession needs a book which is apace with the times. If our ears do not deceive us, the profession will soon be introduced to a work upon a similar subject by one whose pen has covered more manuscript than that of the author of the work before us, and we await with much curiosity, the developments in the race for success, between the two. There will be room for both.

DESTY ON TAXATION. The American Law of Taxation, as determined in the courts of last resort, in the United States. By Robert Desty. Vol. I. Saint Paul, West Publishing Co. 1884.

The field of legal literature has been covered so much of late years by new men, aspiring authors, that it affords us much pleasure when we see once more the hand of a tried and good worker moving "for the weal of his brethren." The author to whom we refer, seems to have an irresistible desire to engage in Federal work, "Federal Procedure," and "Federal Constitution" having been treated by him; the "Federal Citations" having been prepared by him, and that excellent Reporter, the "Federal Reporter" being ably edited by him. American Criminal Law, Shipping and Admiralty, Commerce and Navigation, have all been made subjects for treatises from his pen, and the success which has attended all his efforts, is so sufficient a guaranty of the thoroughness of his work, and his popularity, that doubts of the success of this last undertaking may well be dispelled. He has in the book before us adopted his usual style. A rule is first stated which generalizes what is to follow. Then the law is stated in the form of a good digest, all the law being put together in a style which makes it readable. Quotations nowhere appear. Dissertation is never seen. For ready reference, this manner of treatment is sufficient; but for one who is investigating questions for appellate courts, or for argument before any court, its utility may be well doubted. The author aims to do nothing more than furnish something which the busy practitioner may have at his side and use in a moment, to ascertain what is the law. The table of cases show that over 4,000 cases have been examined for this volume alone—and the index is inimitable. Whatever may be said of the merits of the work of anyone, no one can claim to excel Mr. Desty in indexing. He is a thorough book-maker in every respect. This book deserves a place on every shelf.

LEGAL MISCELLANY.

THE MARRIED WOMAN'S ACKNOWLEDGMENT.

Perhaps there is no specimen of animated nature that has been the innocent occasion of so much cussedness, in Ohio law, as the Married Woman. As an institution of utility, in the domestic circle she is without a peer, and as an ornament of society her splendor dazzles, but she has made the vale of jurisprudence a vale of tears. It is true that in olden times, as between man and wife, God made the twain one flesh, but Ohio had not long been a settled State before we proceeded to and did explode that notion. In the year 1649 the selectmen of Stamford, Conn., upon organising the corporation enacted an ordinance to the effect that, "the laws of God shall govern this community until we can find time to make better ones."

When, therefore, the legal entity was dissolved, and married women came to have rights of their own, then indeed was there music in the air and no pitchpote to play it with. It was enacted that a wife should be examined "separate and apart" from her said husband, "the contents thereof made known and explained to her," etc., with which every lawyer is familiar. It is probably not too much to say that no collocation of words—not even the Constitution of the United States—ever raised so much dirt rut to the square inch, as did this statute. The Ohio reports have unnumbered cases deciding this way and that way, first affirming and then denying, to an extent that bewilders the intellect, and shows how frail is man when tormented by woman.—*Weekly Law Bulletin.*

THE LAW AS TO THE NEAREST DOCTOR.

A case of some importance to medical men came before Mr. Giffard, the judge of the Exeter District County Court, on Wednesday last. The mayor of that city, Mr. Alderman R. C. Watkinson, was sued by a local surgeon, Mr. John Moone, for 5s. for medical attendance. The evidence showed that on Sunday, May 25, a person was taken suddenly ill at St. Michael's Church. The mayor, who was present, immediately sent a boy for the plaintiff, who charged his worship 5s. The mayor declined to pay, and said that if the man attended could not pay, the bill should be sent to the watch committee. This, however, the plaintiff refused to do. His honor held that merely sending for the nearest medical man was no contract, and gave judgment in favor of the mayor, who had only done what any other gentleman would do under the circumstances.—*Law Journal.*

CAN A CITIZEN SUE HIS STATE IN A FEDERAL CIRCUIT COURT?

In the latest aspect of the determined fight the Virginia bondholders are making against the attempted repudiation of the State debt, a novel question of Federal jurisdiction has arisen, viz: Whether a State can be sued by its own citizen in a Federal Circuit Court upon a right given him by the Federal Constitution, of which right the State has deprived him? It may be safely asserted, we believe, that the question has never before arisen: and when it is considered how closely allied it is to the great question involved in Chisholm v. Georgia (2 Dallas, 419), it is surprising that it should have remained dormant during the ninety-two years which have elapsed since that decision. In Harvey & Blair v. Virginia, reported in the present issue of the *Journal*, the question arose before Judge

Hughes in the Circuit Court of the United States for the Eastern District of Virginia, and the affirmative of the proposition is held, though the question was not necessary for the decision of that case. There is, therefore, no doubt as to what his judgment will be in the cases which have already been brought in that court raising the question for decision. Have the States of the Union granted such jurisdiction to the Federal courts by the first clause of section 2 of Art. III of the Federal Constitution? If so, the question is not open for discussion. Neither Cohens v. Virginia, 6 Wheat., 375, nor Ames v. Kansas, 111 U. S., 449, decides the question, in a technical sense; but it seems to us impossible to examine the reasoning upon which those cases proceed, and escape the conclusion at which Judge Hughes arrives. And a careful examination of the question has convinced us that such jurisdiction exists, and that for the great ends of justice it ought to exist.—*Virginia Law Journal.*

CRITICISM OF JUDGES.

The *Chicago Legal Adviser* comments thus on the West virginia contempt case:

"The law is pretty well settled in this country that courts may punish for constructive as well as for direct contempts, but this case would seem to involve more a question of fact than of law. Was the article complained of really a contempt of court? The most that could be said of it is that it is an unfavorable criticism upon the alleged action of the judges, and is not such an article as ought to have appeared in a paper of the standard of the *Intelligencer*; but if the judges had failed entirely to notice it or to take any action with reference to it, the consequences, it would seem, could not in any way endanger the dignity of that court. Whilst it may have exasperated the minds of the judges individually, still as a matter of policy it would have been better to have allowed the matter to have passed unnoticed.

A similiar case arose in Illinois some time ago where the publishers of a leading newspaper of the State were attached and punished for a constructive contempt in publishing an article in their paper, but the article contained a very serious charge of bribery, in which proceeding the action of the court was universally justified.

The power of courts to attach for constructive contempt is a good deal of a fiction at best, and should be exercised with the utmost discretion and caution. The reckless criticisms which are indulged in at this day in the newspapers with reference to courts and judges, must sooner or later bring the newspapers into contempt among the people, much more than their conduct will endanger the standing and respect for the courts in the public mind."

STARE DECISIS.

The Supreme Court of Indiana, has lately expressed the following: "It is true, indecision, instability and inconsistencies in judgment ought to be carefully guarded against, by all courts of last resort, and that by want of care in these respects, the standing and influence of a court may be greatly weakened in public estimation. But unfortunately, there is no court within our knowledge, which has had an existence for any considerable length of time, that has not felt constrained under the pressure of a more careful or a more extended examination, to overrule cases previously decided by it. In the administration of justice, as in all human affairs, there are currents and counter-currents, resulting from ceaseless enquiry and discussion, which carry us sometimes in one direction and then again in another, and which often urge us beyond the limit, which precedent has prescribed for us. This not unfrequently leads either to the modification or the abrogation of old rules of practice or decision, and to the substitution of others, more in accordance with the teachings of experience. Because of the uncertainty, to which these new departures are likely to impress upon the public mind, they are usually the subject of regret, but they are none the less seemingly inevitable: When a court comes to the deliberate conclusion, that it has made a mistake upon some former occasion, it is generally better, looking to future permanency and repose, that it shall frankly acknowledge its mistake and declare the true doctrine, as it should have been announced. When, however, a decision has become an established rule of property, it is never overthrown, except from the most urgent considerations of public policy. To that extent only are the courts ordinarily restrained from attempting to repair mistakes which they may have made."

HUMOROUS JUDGES.

A story runs thus: "A very neat *mot* is credited to Judge Grover, in a tilt at the bar with Judge Peck. The latter had delivered a particularly rasping speech, in which the former felt compelled to reply in kind. 'Your honor,' he said, 'it rained last night, and this morning, when I took my course across the fields, at almost every step I came upon some slimy, venomous creature that had issued from its hiding-place. Snails, toads, frogs, lizards, worms, snakes, vipers, adders—every description of loathsome reptile was to be seen, crawling, filled with venom, and yet, your honor, though there seemed so many of them, all of them put together, would not have made up a peck!' This strikes us as more savage than "neat." Possibly Judge Peck deserved it, but if we had been in his place we should have suggested that Judge Grover had been taking his "bitters" too strong that morning. Another legal story is going the newspaper rounds, and we reproduce it. "On one of the many official excursions made by boat to Fortress Monroe and Chesapeake bay, Chief Justice Waite of the Supreme Court, Judge Hall of North Carolina, and other dignitaries of the bench were participants. When the government steamer had got fairly out of the Potomac and into the Atlantic, the sea was very rough, and the vessel pitched fearfully. Judge Hall was attacked violently with seasickness. As he was retching over the side of the vessel and moaning aloud in his agony, the chief justice stepped gently to his side and laying a soothing hand on his shoulder said: 'My dear Hall! can I do anything for you? just suggest what you wish.' 'I wish,' said the seasick judge, 'your honor would overrule this motion!'"—*Albany Law Journal.*

LAW SCHOOLS.

The law school is becoming the educator of aspirants for honors at the bar. The rapidity with which knowledge of legal principles is acquired at law schools as compared with the progress made by those who confine themselves to office study is very marked. It may be safely said that the latter are generally obliged to depend upon themselves, and must make headway by their own efforts. It requires something more than the mind of an ordinary law student to acquire a solid knowledge of legal principles in an office. At the law

school he is guided by competent lecturers and instructors, and the work at least, facilitated. Attendance upon the lectures introduces him to systematic methods of teaching and study of the law, so that his mind may step by step become the more capable of grasping the reasoning of the law, and making the proper solution of legal questions. It develops his legal mind if he has any, and obliges him to look at things from the standpoint of one who has not a mere collection of *syllabi* of cases packed together "in a heap" in his head. One of the best law schools in the country is the law department of Washington University, at St. Louis, Mo., presided over by Dr. Wm. G. Hammond, one of the profoundest jurists in our country, many years the Chancellor of the Iowa State law school. His services were sought by the Washington University, and rendered, and since 1881, the time at which he took charge, the school has steadily grown not only in numbers, but in efficiency, until it has reached a point, where its managers may well stop and be proud. It makes no "spread" for the mere purpose of obtaining recruits. It rather prefers to grow upon its own merits. Its eighteenth year begins October 13, 1884. Its moot court is one of the best departments of the school, and we believe that in its efficiency it is excelled by none. It has a strong corps of lecturers, three of them judges or ex-judges, and the other four, in addition to the Dean, are at the top of the St. Louis Bar. The Dean has lately compiled some examination papers and moot court briefs, which can be had of him for the mere cost of printing, $2.00.

HONESTY IS THE BEST POLICY.

"Sambo," said the Judge, "you are charged with stealing two chickens from your neighbor, Mr. Bowen. Are you guilty or not guilty?" "Dis nigga nebba stole nothin', sah." "Never in your life, Sambo?" "No, sah; not at de present time, sah." "How about the chickens?" "Dis nigga nebba stole 'em, sah." "Will you explain to the court then, how you got them?" "Yes, sah. Yo' see, sah, dem chickins wuz a settin' on de fence wid nuffin' much to do, an' I frowed some cawn outen de yahd an' tole em powahful particlah not to tech hit, er I'd knock the thieben heads offen 'em. Den, sah, I sot down an' watch dem chickins, an' dey don't pay no tenshun a tall; but bress yo' soul, Jedge, dey hop right inter de yahd an' begin foh to eat my cawn widout axin' me a wo'd. Den I done jis what I tole 'em I'se boun' to do, an' I knockt 'em bofe eendways wid a pole." "But, Sambo, you took them into the house and had them cooked for your supper." "In cose I did, boss! Yo' don't spose I wuz gwine to let dem chickins lay in dat yahd an' spile, an' fill de whole neighbahood wid a bad smell, did yer? I'se a chu'ch membah, I is, an' I knows dat de good book says we mus' lub ouah neighbahs, an' treat 'em squah, an' I'se gwine to do hit, bress de Lam'!" "Five dollars and costs," said the Judge, and Sambo went out with a constable.

NOTES.

——Court (to prosecutor): "Then you recognize this handkerchief as the one which was stolen from you?" Prosecutor: "Yes, Your Honor." Court: "And yet it isn't the only handkerchief of the sort in the world. See, one I have in my pocket is exactly like it." Prosecutor: "Very likely, Your Honor, I had two stolen."

——The Hon. William Daniel, of Baltimore, temporary chairman of the recent Prohibition National Convention at Pittsburg, is a man of diminutive stature and boyish appearance. It is told that when he was one of the most distinguished lawyers on the "East'n Sho'" of Maryland, he visited one day one of the old families where still obtained the custom of making the children eat at a second table after their elders had dined. So when dinner was announced one of the half-grown boys of the family sidled up to Mr. Daniel with the invitation, "Let's you and me go out an' play sock ball while the grown folks eat dinner."

——*Pump Court* says: "Mr. Jesse Herbert is supposed to be the shortest barrister in England. 'Mr. Herbert,' a judge once said to him severely, 'It is customary for counsel to stand when they are addressing the court.' 'I am standing up, my Lord,' was the plaintive response. 'Eh, what?' said his Lordship, 'I beg your pardon, I'm sure. Go on, please.'"

——"When I lectured," said Eli Perkins, "before the Carlisle (Pa.) Teachers' Institute, they told me innumerable stories about that grim old patriot and anti-slavery agitator, Thad Stevens. One day the old man was practicing in the Carlisle courts, and he didn't like the ruling of the presiding judge. A second time the judge ruled against 'old Thad,' when the old man got up with scarlet face and quivering lips and commenced tying up his papers as if to quit the court room. 'Do I understand, Mr. Stevens,' asked the judge, eyeing 'old Thad' indignantly, 'that you wish to show your contempt for this court?' 'No, sir; no, sir,' replied 'old Thad.' 'I don't want to show my contempt, sir; I'm trying to conceal it!'"

LAYS OF THE LAW.

A HINT TO QUEEN'S COUNSEL.

AIR: *The Song of the Foster Brother in "Olivette."*

When the junior sits in trepidation
With the case on the list for the day,
The leader, to uphold his reputation,
Gets the clerk to call him away.
Then is the time for disappearing;
Pick up your skirts, and off you go;
But when the time comes on for hearing
Bob up serenely from below.

But if matters turn out badly,
Or the evidence isn't quite clear,
And you begin to recognize sadly
That the case is looking queer,
Then is the time for disappearing,
Pick up your skirts and off you go;
But when the jury round is veering
Bob up serenely from below.

And when deserted thus by you,
The junior turns the current round
And shows the evidence is true,
And that the points of law are sound,
Then is the time for *re*-appearing;
Pick up your skirts and back you go;
Since the sky above is clearing,
Bob up serenely from below.

Or if you hear, while off you stray,
The other side are bound to lose,
Rush back quickly, and for judgment pray.
But if the court should that refuse,
Then is the time for disappearing;
Pick up your skirts, and off you go;
And if you see your client nearing,
Say— I always told you so."

—*Pump Court*